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**BEFORE THE PUBLIC UTILITIES COMMISSION**

**OF THE STATE OF CALIFORNIA**

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| Application of California-American Water Company (U210W) for Approval of the Monterey Peninsula Water Supply Project and Authorization to Recover All Present and Future Costs in Rates. | A.12-04-019<br>(Filed April 23, 2012) |

# PUBLIC TRUST ALLIANCE'S OPENING BRIEF ON TECHNICAL AND LEGAL ISSUES PRESENTED IN A. 12-04-019 AND OPENING OPPORTUNITIES FOR BEING REASONABLE WHILE FACING CHANGING CIRCUMSTANCES

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# I. INTRODUCTION

Pursuant to Rule 13.11 of the California Public Utilities Commission Rules of Practice and Procedure, the Public Trust Alliance submits this brief with the intent of aiding the Commission in making a reasonable Decision to resolve Application No. 12-04-019 (filed April 23, 2012). The Public Utilities Commission process is the institutional form our state has cultivated for "reasonably" mediating and regulating complex public choices for financing, construction, and operation of essential public infrastructure. As a public institution, it has indeed often proved to do an effective and sophisticated job. All the while CPUC process is intended to function in seamless concert with other public agencies, the Commission faces its own sets of challenges as it works. And as in every public arena where money is to be made, one can expect various players to attempt to game, control, co-opt or buy the process to their particular advantage. In the case of this application, the public challenge has become demonstrating that legitimate public expectations can be credibly delivered on. Is the Monterey Water Supply Project actually a "reasonable" response to a longstanding regional water supply problem? Or is it a thinly disguised boondoggle that highly paid lawyers are trying to put lipstick on? Employing longstanding legal principles that function somewhat akin to enforcing an overarching institutional "implied warrantee of fitness for intended use," the Public Trust Alliance has intervened in this proceeding on behalf od long standing public interests and with no abiding economic self-interest in the outcome. We hope we can be of some help.

An "Evidentiary Hearing" was concluded on December 2, 2013 but the Public Trust Alliance remains unsure whether that particular hearing was of the type described in Article 12 (Rule 12.3), or whether it was an extension of a more general proceeding described in Article 13 (Rules 13.1 to 13.14) where additional evidence might be introduced to satisfy minimum requirements of either a), an Application seeking authority for Construction or Extension of Facilities (Rule 3.1) or b), an Application for Authority to Increase Rates (Rule 3.2), or, as a result of the Joint Governance and Financing Agreement submitted as part of the Settlements involving the Utility, Cities and the Monterey Peninsula Water Management District and Regional Water Authority (mostly public entities not under Commission jurisdiction) c), an Application adjusting Debt and Equity

(Rule 3.5) or d), an Application dealing with Transfers and Acquisitions (Rule 3.6), or some hybrid combination of all four distinct species of Applications described in Article 3, and thus allowing the original Application to appear as if it might satisfy all the conditions to assure the public that it is indeed properly before the Commission. The basic problem is that the process has been so strategically manipulated as to be beyond public recognition and there is no credible way for anyone to "explain" what is happening to a deeply concerned public.

In the face of these multiple procedural ambiguities, our analysis remains the same: despite thousands of pages of testimony, exhibits, motions and rulings, the novelty, magnitude and character of technical and legal issues presented by A. 12-04-019 tend to militate against treating it as a "typical water supply problem" suitable for expedited California Public Utilities Commission resolution. This conclusion is additionally buttressed since it has been posited that multiple complex issues be resolved through a "settlement" procedure (CPUC Rules Article 12) where it is not clear whether any minority combination of settling parties have the authority or competence to surrender the public rights at stake in experimental water supply development. Settlements before the CPUC were never intended to "constitute approval of, or precedent regarding, any principle or issue in the proceeding or in any future proceeding" (Rule 12.5). It is thus hard to imagine that any major urban water supply predominantly relying on privately owned and operated innovative slant well construction and energy intensive desalination technology, along with all its new institutional and environmental impacts , sited in an increasingly vulnerable coastal zone, would be considered suitable subject matter for any kind of "expedited settlement," entered into behind closed doors or without adequate open public discussion in multiple public forums and where key evidence of "Reasonableness" is requested to be filed under seal. A. 13-05-017 Motions of Cal-Am, Monterey County Water Management Agency and by Counsel for Monterey County.

Additionally, multiple current regulatory scandals and recent advances in scientific knowledge and public understanding of hydrology and changing climate make it impossible to justify any assumption that this Application **MIGHT** even present a problem eligible for expedited consideration by experts behind closed doors. Even during the course of this proceeding, significant changes in the social, political and institutional

"climates" into which any Commission Decision will be introduced have also occurred. eg. public response, including those of many insurance businesses to "Superstorm Sandy." And, as they always have in the past, these changing understandings of physical and institutional circumstances require responsive action on the part of the Commission. It is simply no longer credible to insist that public institutions are automatically trustworthy simply because of their functions. Direct local experience indicates otherwise and this experience suggests that more transparency, and not less, is most appropriate for any further public discussion.

The civic viability (aka "credibility") of Commission Decisions depends entirely on the extent to which the subject matter is publicly perceived to be properly before the Commission and then the extent to which the Commission exercises appropriate legal discretion. Evaluating these various "extents" are dominant themes of both public law and science. The appearance and believability of "reasonableness" are the currency of the realm. But beyond these seemingly esoteric disciplines, the financing, construction and operation of a public water supply for the Cities on the Monterey Peninsula is of critical public interest to all the Californians who live in the region and will depend on that water supply to support their lives. It is their very future which is at stake. And our governance institutions are supposed to protect long term public interests in the day to day business of public life. As intense institutional concerns encounter extreme physical forces and conditions, multiple public agencies become necessarily involved. While it might appear "best" to some parties that most aspects of the public choice be handled through "confidential" Commission procedures, the technical and legal character of the public issues, and their magnitude, make "routine" treatment by any sort of "assumption" absolutely inappropriate. The choice of selecting privately owned and operated seawater desalination as the dominant aspect of a public water supply must be treated as the fundamentally discretionary action that it is and not be misleadingly characterized as any sort of "inevitable" or merely "ministerial" undertaking. It is fundamentally a legislative process and should not be disguised as a routine business matter that can be "solved" entirely through the law of commerce, property and contract.

Instead of continuing to force through a particular project by assumption, perhaps public resources would more beneficially be applied to having a more open (less obviously

manipulated) public discussion and inviting public participation by a broader range of governance and public reporting entities. These groups and organizations will surely be involved in any permitting process in all conceivable scenarios. Their early and "meaningful" participation are required for ultimate success and public acceptance of any policy decisions, a spirit completely in consistent with established Commission policy.

## II. CALIFORNIA LAW CANNOT CONSTITUTIONALLY REQUIRE "WASTE" OR UNREASONABLE DIVERSION OR USE OF THE WATERS OF THE STATE

While some parties might dearly desire it, the California Public Utilities Commission is bound to have a difficult time ordering any entity to finance and construct a seawater desalination plant to serve as the primary public water supply for any California City. This is simply because it does not make practical sense, and it might even be counter to longstanding California Law. Perhaps the most central building block of contemporary California Water Law is Article X, Section 2 of the California Constitution , which was introduced as a legislative response to a legal initiative to persist in a wasteful irrigation practice to which the holder of a California Water Right thought she was legally entitled:

> "SEC. 2. It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial thereof in the interests of the people and for the public welfare. The right to water or the use or flow of the water in or from anynatural stream or watercourse in this State is and shall be limited to such water as should be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian

> under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in furtherance of the policy in this section contained.

This explicit policy established "reasonable" bounds on the kinds of arguments lawyers might make regarding private claims to California water resources. It has been the law of California for nearly a century and it is deeply institutionalized in the operating procedures of public agencies. Of course, any legal advocate is entitled to articulate any cogent argument he might want, but there have to be actual limits to the extent of public credibility simply by virtue of the words in the law and its public understanding.

Rational efforts to more effectively share available public resources are encouraged by public institutions. Our particular organization has a mission of raising the profile of a particular strand of law called the "public trust doctrine" which has been a fundamental part of public water law for Millennia rather than Centuries. And it is sometimes a helpful reminder that law is intended to serve the people rather than being construed the other way around. Private commercial law is often used and manipulated for private gain, but public concepts of "reasonableness" and simple guidelines for collaborative behavior have also been a powerful part of our public law. And in a context of changing conditions, the "reasonable use" standard makes far more sense than arbitrary claims to specific quantities that may never have existed in nature.

People see streambeds, and groundwater levels are being more carefully monitored than in the past. Even though it is sometimes an attractive option, it makes less sense than ever to pretend that a water rights holder actually somehow "owns" the water. That has never been the case in California and the public is legally entitled to reasonable conduct from their leaders. When any given action has downside risks and costs that are far greater than any probable public benefits, it is incumbent on any regulated utility to abandon it as "unreasonable." Hiring more lawyers at public expense should not be an option. It seems that a minority group of settling parties has made the assumption that rational sharing of public water resources by Agricultural and Urban populations is somehow a challenge "that will not be solved in this generation" and thus, with that as a background, it somehow automatically makes sense that seawater desalination is the way to go. Unfortunately, a

whole spectrum of responses make more sense in both short and long term consideration. People and communities living along the whole stretch of the Salinas River have been working on these problems for decades, and there are still very productive projects in reservoir management at the top of the watershed that make much more sense than any desalination project and involve larger quantities of water for almost everyone.

## III. CALIFORNIA PUBLIC UTILITIES CAN ONLY RECOVER REASONABLE COSTS FROM RATEPAYERS AND ARE LEGALLY REQUIRED TO ACT REASONABLY IN THE FACE OF CHANGING CIRCUMSTANCES

Perhaps one of the greatest examples of "changing circumstances" to have occurred during the pendency of this proceeding has been the public recognition of the profound impacts of global climate change on public water supplies. In the area of aquifer conservation alone, not only over pumping but sea level rise and changing precipitation distribution also have to be considered. Groundwater law was already in disarray before this hearing even began because of outdated mythology related to "percolating groundwater" and its supposed dynamics. But climate change moves familiar legal positions still further from known public reality. Most water law practitioners were already painfully aware of the fragile nature of applied legal assumptions in the area of groundwater advocacy, but then, we had to react to a seeming new era of "Superstorms" and other extreme weather events. But there seemed to be remarkably little change in the way Salinas Valley interests appeared to look at the situation. It was apparently the same as ever to them, but almost crystal clear to many others that the "Superstorms" and rising sea levels could change a lot of things indeed. In order to appear anywhere near "reasonable," it was apparent that a whole range of alternatives in parts of the watershed further removed from the vulnerable coastal zone would have to be considered.

At the same time, "reasonable" attention to ratepayer concerns would increasingly disfavor an endless transfer of "legal fees" to accounts to be paid by them. (After all, they might even try something as desperate as trying to buy back their own water service agency). A series of unfeasible water supply projects has resulted in literally millions of dollars in "reasonable pre-project costs." While certain attorneys may view this gravy train

as well-deserved spoils, the practice has clearly squandered a great deal of public credibility and should probably be stopped sooner rather than later.

## IV. CALIFORNIA LAW IS BIG ENOUGH TO ACCOMMODATE A REASONABLE APPROACH. ARE WE?

A great deal of effort and time has been devoted to using the CPUC process to solve and implement a sustainable alternative public water supply for the cities on the Monterey Peninsula. The PUC is a valuable public institution that should not be put up for sale or be available for co-optation by political or economic power. This is actually a very likely possibility if meetings and the lion's share of work is undertaken behind doors that are locked to the public. Key public rights and prerogatives are at stake in making the choice of which technology to employ to serve public needs. If more of the argument can take place in public, public interests are more likely to be served and there is smaller opportunity to hijack the process. Public argument also requires advocates to say clearly what they want. Final oral argument before the Commission would best serve the public because clear statements would have to be articulated instead of being buried in reams of paper and pleadings and exhibits that no mortal creature could ever read completely and comprehend.

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Respectfully Submitted,

By_____/s/_____

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